



**FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY**

HARRY GIBBS COMMONWEALTH LAW COURTS
119 NORTH QUAY
BRISBANE QLD 4000

26 April 2022

Nikolaos
Right to Know

By email: foi+request-8503-aa8c1014@righttoknow.org.au

Dear Nikolaos,

Request under the Freedom of Information Act

I refer to your email to the Federal Court of Australia (**Court**) of 22 February 2022 requesting access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Specifically, you have requested the following:

Throughout an article published in the Australian on 8 February 2022 (Untried junior lawyers score key Federal Court positions) there are references to the director of national operations, Andrea Jarratt. If the article is to be believed, it would appear that Andrea Jarratt had considerable involvement in the appointment of a national registrar who lacked essential qualifications for that position.

I would like to know what Andrea Jarratt's role in the appointment process was. I would also like to know what the director of national operations does.

Under the FOI Act, I request access to the following documents:

- (a) the vacancy notification published in the Public Service Gazette for the director of national operations role; and*
- (b) the classification evaluation for the director of national operations role; and*
- (c) all role/duty descriptions for the director of national operations role since the role was first created; and*
- (d) all emails sent or received by Andrea Jarratt in relation to the selection and or appointment of the male national registrar referred to in the 8 February 2022 article in the Australian; and*
- (e) all file notes, memos etc prepared or directed to Andrea Jarratt about the selection and or appointment of the male national registrar referred to in the 8 February 2022 article in the Australian.*

As advised in the acknowledgement letter sent to you on 25 February 2022, your request seeks access to documents that contain personal information about individuals. It was considered that the individuals concerned might reasonably have wished to contend that the documents

were conditionally exempt under section 47F of the FOI Act, and access to the documents would, on balance, be contrary to the public interest under the FOI Act.

In accordance with subsection 27A(3) of the FOI Act, the Court was required to give those individuals a “*reasonable opportunity to make submissions in support of the exemption contention*” before making a decision on the release of the documents that contain personal information about them.

For this reason, the Court determined that, under subsection 15(6) of the FOI Act, it was appropriate to extend the period for processing your request to 26 April 2022.

Authorised decision-maker

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

Searches undertaken

Extensive searches were undertaken by senior staff in the Court’s People and Culture team, and other staff, to identify any documents falling within the scope of your request. These searches included discussions with senior employees of the Court, searches of the human resources and recruitment inboxes, searches of individual staff members’ inboxes, searches of the Court’s national network drive and searches of the Court’s electronic document, records management and information systems.

As a result of the searches undertaken, a total of seventeen (17) documents were identified. The table below lists the documents that were identified as falling within the scope of the relevant paragraphs of your request. Where there were no documents identified, the table notes that ‘nil’ documents were identified as falling within the scope of your request.

Paragraphs (a) and (c)	One (1) document that is a gazette notice
Paragraph (b)	Nil
Paragraphs (d) & (e)	<p>Sixteen (16) documents comprising:</p> <ul style="list-style-type: none">• An email in relation to arrangements for reference checks• Two (2) confidential emails in relation to the registrar recruitment exercise• An email to human resources• An email in relation to the candidate for the national registrar position• An email regarding interview notes and reference checks• An email attaching interview notes and a summary• An email outlining the interview questions for the advertised position• An email attaching offers of employment• An email regarding references with an attached spreadsheet• An email in relation to the registrar recruitment exercise• An email attaching a selection report• An email in relation to the interview schedule and shortlist• An email attaching proposed contracts• An updating email on the registrar recruitment• An email attaching a selection report

I am satisfied that by conducting these searches the Court has taken all reasonable steps to identify the documents you have requested.

Decision

I have decided the following in relation to your request (set out below in accordance with the paragraph numbering adopted in your FOI request):

- Paragraphs (a) and (c) – to grant you access in full to the document that falls within the scope of your request in paragraphs (a) and (c).
- Paragraph (b) – pursuant to subsection 24A(1) of the FOI Act, to refuse your request as I am satisfied that all reasonable steps have been taken to find the documents you have requested in paragraph (b), but the documents cannot be found or do not exist.
- Paragraphs (d) and (e) – pursuant to sections 47C, 47E(c), 47E(d) and 47F of the FOI Act, to refuse your request for access to documents that fall within the scope of paragraphs (d) and (e) as I am satisfied that the documents identified are conditionally exempt as they would disclose a deliberative process and/or have an adverse effect on the operations of an agency and/or be an unreasonable disclosure of personal information. Further, and on balance, disclosure would be contrary to the public interest under subsection 11A(5).

I have taken the following into account in making my decision:

- the terms of your request;
- the nature and content of the documents that fall within the scope of your request;
- the relevant provisions of the FOI Act and case law considering those provisions;
- the third party submissions received following consultations under section 27A of the FOI Act;
- the *Freedom of Information (Charges) Regulations 2019* (**FOI Charges Regulations**); and
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**).

Reasons for decision

Section 24A(1) of the FOI Act – Documents cannot be found, do not exist or have not been received

Paragraph (b) of your FOI request

I have decided, pursuant to subsection 24A(1) of the FOI Act, to refuse your request for access to documents under paragraph (b) of your FOI request, as I am satisfied that all reasonable steps have been taken to find the documents you have requested, but the documents cannot be found or do not exist.

Subsection 24A(1) of the FOI Act provides:

- (1) *An agency or Minister may refuse a request for access to a document if:*
- (a) *all reasonable steps have been taken to find the document; and*
 - (b) *the agency or Minister is satisfied that the document:*
 - (i) *is in the agency's or Minister's possession but cannot be found; or*
 - (ii) *does not exist.*

As mentioned above, extensive searches were undertaken by staff of the Court to identify any documents falling within the scope of your request. As a result of the searches undertaken, no documents could be found that fell within the scope of paragraph (b) of your request. I am not aware of any other steps that could reasonably have been taken to identify the documents you have requested.

Having regard to the above, I am satisfied that all reasonable steps have been taken to find any documents within the ambit of your request in relation to paragraph (b), and that the documents cannot be found or do not exist. As there are no documents to provide you under these paragraphs of your request, I have decided to refuse access to the documents requested under that part of your request pursuant to subsection 24A(1) of the FOI Act.

Conditional exemption under section 47C of the FOI Act – Deliberative processes

Paragraphs (d) and (e) of your FOI request

I have considered whether the documents found in relation to paragraphs (d) and (e) of your request are conditionally exempt from disclosure under subsection 47C(1) of the FOI Act.

Subsection 47C(1) prescribes that:

*A document is conditionally exempt if its disclosure under this Act would disclose matter (**deliberative matter**) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:*

- (a) an agency; or*
- (b) a Minister; or*
- (c) the Government of the Commonwealth.*

In relation to requests that concern conditionally exempt documents containing deliberative matter, the FOI Guidelines provides the following at 6.52:

... Deliberative matter is content that is in the nature of, or relating to either:

- an opinion, advice or recommendation that has been obtained, prepared or recorded, or*
- a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister (s 47C(1)).*

Relevantly, the FOI Guidelines also provide:

6.55 The deliberative processes exemption differs from other conditional exemptions in that no type of harm is required to result from disclosure. The only consideration is whether the document includes content of a specific type, namely deliberative matter. If a document does not contain deliberative matter, it cannot be conditionally exempt under this provision, regardless of any harm that may result from disclosure.

6.58 *A deliberative process involves the exercise of judgement in developing and making a selection from different options:*

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.¹

6.59 *'Deliberative process' generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.²*

6.60 *The deliberative process must relate to the functions of an agency, minister or the government of the Commonwealth. The functions of an agency are usually found in the Administrative Arrangements Orders or the instrument or Act that established the agency. For the purposes of the FOI Act, the functions include both policy making and the processes undertaken in administering or implementing a policy. The functions also extend to the development of policies in respect of matters that arise in the course of administering a program. The non-policy decision making processes required when carrying out agency, ministerial or governmental functions, such as code of conduct investigations, may also be deliberative processes.³*

6.61 *A deliberative process may include the recording or exchange of:*

- *opinions*
- *advice*
- *recommendations*
- *a collection of facts or opinions, including the pattern of facts or opinions considered*
- *interim decisions or deliberations* [footnote omitted].

I am required to assess the material to decide if it relates to a deliberative matter or is in the nature of the deliberative processes.⁴ Upon assessment, I am satisfied that the documents that fall within the scope of paragraphs (d) and (e) of your request include content of a deliberative matter and/or are in the nature of a deliberative matter, as they record exchanges and/or information about the selection process the subject of the FOI request in question. Specifically, they record:

- exchanges about the candidates for the national registrar position,
- recordings and/or exchanges regarding interview notes and reference checks,
- factual recordings of the interview notes and summaries,
- selection reports,
- advice about the proposed duties and responsibilities regarding the role,
- opinions made about written applications and presentation at interview,
- opinions of referees, and

¹ See *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67. See *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19, [15]–[22]. See also *Carver and Fair Work Ombudsman* [2011] AICmr 5 in relation to code of conduct investigations.

² *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18].

³ See *Re Murtagh and Commissioner of Taxation* [1984] AATA 249, *Re Reith and Attorney-General's Department* [1986] AATA 437, *Re Zacek and Australian Postal Corporation* [2002] AATA 473.

⁴ *Secretary, Department of Employment, Workplace Relations v Small Business and Staff Development and Training Centre Pty Ltd* (2001) 114 FCR 301.

- comparative assessments and recommendations about the selection process the subject of the FOI request in question.

The recordings and/or exchanges took place prior to the making of a final decision regarding the recruitment exercise in question and are clearly part of a wider deliberative process.

Therefore, I find that disclosure of these documents would disclose deliberative matter and, for this reason, the documents are conditionally exempt under subsection 47C(1) of the FOI Act.

The question of whether disclosure would or would not be contrary to the public interest under subsection 11A(5) is considered separately in the relevant section below.

Conditional exemption under sections 47E(c) and 47E(d) of the FOI Act – Operations of an agency

Paragraphs (d) and (e) of your FOI request

I have considered whether documents in relation to paragraphs (d) and (e) of your FOI request are conditionally exempt from disclosure under subsections 47E(c) and 47E(d) of the FOI Act.

Section 47E(c) and (d) relevantly provide that a document is conditionally exempt if its disclosure under the FOI Act would, or could reasonably be expected to, do any of the following:

...

- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;*
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

The FOI Guidelines provides the following in relation to subsection 47E(c):

6.113 Where the document relates to the agency's policies and practices relating to the assessment and management of personnel, the decision maker must address both elements of the conditional exemption in s 47E(c), namely, that:

- an effect would reasonably be expected following disclosure*
- the expected effect would be both substantial and adverse.*

6.114 For this exemption to apply, the documents must relate to either:

- the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety*
- the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.*

[footnotes omitted]

Paragraph 6.123 of the FOI Guidelines provides guidance on section 47E(d):

The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply.

For the reasons outlined below, I am satisfied that the sixteen (16) documents identified as falling within the scope of paragraphs (d) and (e) of your FOI request are conditionally exempt as disclosure under the FOI Act would have a substantial adverse effect on the management or assessment of personnel by the Court and on the proper and efficient conduct of the operations of the Court under subsections 47E(c) and 47E(d) of the FOI Act.

The documents which were identified as falling within the scope of paragraphs (d) and (e) of your FOI request relate to both the:

- “*management of personnel*” in the sense of relating to the recruitment activities of the Court, and
- “*assessment of personnel*” in the sense of containing an assessment of the skills, knowledge, experience and attributes of internal and external applicants for the national registrar position.

Specifically, those documents are:

- an email in relation to arrangements for reference checks,
- two (2) confidential emails in relation to the registrar recruitment exercise,
- an email to human resources,
- an email in relation to the candidate for the national registrar position,
- an email regarding interview notes and reference checks,
- an email attaching interview notes and a summary,
- an email outlining the interview questions for the advertised position,
- an email attaching offers of employment,
- an email regarding references with an attached spreadsheet,
- an email in relation to the registrar recruitment exercise,
- an email attaching a selection report,
- an email in relation to the interview schedule and shortlist,
- an email attaching proposed contracts,
- an updating email on the registrar recruitment, and
- an email attaching a selection report.

In reaching this conclusion I have considered “*the context of the document and the integrity of the system*” that require these documents.⁵ The documents in question relate specifically to recruitment processes and discuss candidate suitability and referee comments. For example, the documents include comments regarding the written applications, presentation at interview, employment history, qualifications, reference checks, suitability, and comparative assessments. In this context, the release of this information would clearly have an adverse impact on the integrity of the Court’s recruitment processes and would likely result in the Court being a less attractive employer to prospective candidates and even to existing employees.

The importance of this consideration was discussed in *Department of Social Security v Dyrenfurth* (1988) 15 ALD 232 where it was held that the effects on the integrity of the system from disclosure of these types of documents could reasonably be expected to give rise to:

⁵ FOI Guidelines, paragraph 6.116.

- “difficulties between those concerned, in particular if those persons were associated with one another in their employment”, which effects the “proper and efficient conduct of the operations of the agency”,
- a reduction in “candour and frankness in written reports, assessments and references” if there is a risk that these documents would not remain confidential, and
- a reduction in the “reliability and value” of documents and a greater emphasis on oral communication.⁶

Turning back to the requirements of section 47E of the FOI Act, the FOI Guidelines explain that “for the conditional exemption to apply, the potential effect that would be expected to occur following disclosure must be both substantial and adverse.”⁷

The release of the documents captured by paragraphs (d) and (e) of your FOI request would, or could reasonably be expected to, have a substantial adverse effect on the management of personnel by the Court in several respects. The first is that disclosure of the information would destroy trust in the confidentiality of the Court’s future recruitment and selection processes. This would likely discourage prospective internal and external candidates from applying for positions and, ultimately, make it more difficult for the Court to attract candidates.

The assessment of each candidate, including the candidate the subject of your FOI request, contained within the documents includes information such as interview notes, reference checks, selection reports and comparative assessments. The release of such information could reasonably be expected to create stress and anxiety for employees of the Court by disclosing details of their suitability conducted at a particular point in time. For these reasons, I conclude that disclosure of the documents is likely to have a substantial adverse effect on both the “management of personnel”, and the “proper and efficient operations” of the Court.

Finally, the release of the identified documents could reasonably be expected to substantially damage the trust and morale of employees of the Court. The candidates who applied for the national registrar position would expect that the details of the recruitment process would remain confidential. The disclosure of the documents would prejudice the protection of employees’ right to privacy and potentially result in a deterioration of their morale and productivity. The potential effect on the occupational health and safety and/or health of the individual/s mentioned within the documents cannot be underestimated.

I am satisfied that the release of the documents that fall within the scope of paragraphs (d) and (e) of your FOI request would bear on the Court’s “proper and efficient” operations. The documents relate to recruitment processes which are essential to the proper and efficient operations of the Court. It is imperative that the Court be able to conduct recruitment processes and retain the level of confidentiality that is expected by candidates and the selection panel.

Successful recruitment exercises must have a level of trust so that all involved are comfortable to communicate honestly and freely, whether that be about a candidate’s attributes and qualifications, the duties around a particular role, or discussions about how the Court conducts the process. In particular, disclosure of the correspondence regarding the proposed duties and responsibilities of the successful candidate, would undermine the importance of communication between senior staff, in relation to managing and discussing the direction of roles within the Court, remaining confidential.

⁶ (1988) 15 ALD 232 at 238.

⁷ FOI Guidelines, paragraphs 6.91.

I find that disclosure of the documents could reasonably be expected to have a substantial adverse effect on the operations of the Court as the sensitive information that was recorded by the Court in those documents about the candidates for the national registrar position, including the candidate referred to in your FOI request, was done so on the understanding that such information would not be disclosed to third parties or made publically available on a website.

The recruitment process has already been the subject of several media articles. Disclosure of the information contained within the identified documents carries the risk that the personal details and circumstances of the recruitment be subject to further media attention. It is highly likely that further media attention would have an adverse impact on the proper and efficient operations of the Court.

Should this information now be disclosed, it would act as a discouragement or curtailment to future communications with internal and external stakeholders. It is also likely to inhibit open and candid communication between colleagues in relation to recruitment exercises⁸ which, in turn, impacts on the quality and outcome of the process in terms of deliberations and selection.

I also note that, upon consultation pursuant to section 27A of the FOI Act, objections to the release of the information contained within the identified documents were raised. The reasons given for the objections relate not only to personal privacy, but to the adverse impact disclosure would have on the Court's operations and management of its personnel. In particular it was submitted that disclosure would significantly undermine the effective recruitment processes of the Court and its ability to recruit applicants. It was considered that potential applicants would not be confident that their personal information and assessment about their skills and attributes would remain confidential. This in turn, may affect their ability to secure other employment opportunities.

For the reasons identified above, I consider that the disclosure of the identified documents falling within the scope of paragraphs (d) and (e) of your FOI request are conditionally exempt under section 47E of the FOI Act, as their disclosure would have a substantial adverse effect on the Court's management or assessment of its personnel and on the proper and efficient conduct of the operations of the Court.

As discussed in the relevant section below, I am satisfied that disclosure would be contrary to the public interest under subsection 11A(5).

Conditional exemption under section 47F of the FOI Act – Personal privacy

Paragraphs (d) and (e) of your FOI request

I have considered whether the documents that fall within the scope of paragraphs (d) and (e) of your FOI request are conditionally exempt from disclosure under subsection 47F(1) of the FOI Act.

Subsection 47F(1) prescribes that:

⁸ *Department of Social Security v Dyrenfurth* (1988) 15 ALD 232 at 238.

A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

The term “personal information” is defined in subsection 4(1) of the FOI Act to have the same meaning as in section 6 of the *Privacy Act 1988* (Cth), that is:

...information or an opinion about an identified individual, or an individual who is reasonably identifiable:

(a) whether the information or opinion is true or not; and

(b) whether the information or opinion is recorded in material form or not.

To determine whether personal information is conditionally exempt under subsection 47F(1), I am required to consider whether disclosure of that personal information would be unreasonable.

In considering what is unreasonable, the AAT in *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at 259 stated that:

...whether a disclosure is ‘unreasonable’ requires ... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance...it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information ... and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party...

In relation to the matters that ought to be taken into account in determining whether disclosure would be unreasonable, subsection 47F(2) of the FOI Act prescribes that:

In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:

(a) the extent to which the information is well known;

(b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;

(c) the availability of the information from publicly accessible sources;

(d) any other matters that the agency or Minister considers relevant.

In relation to requests for documents that contain personal information about public servants, the FOI Guidelines stipulate the following:

6.156 A document may, however be exempt for another reason, for example, where disclosure would, or could reasonably be expected to, endanger the life or physical safety of any person (s 37(1)(c)). In addition, where an individual has a propensity to pursue matters obsessively and there is no need for them to contact a particular public servant in the future, disclosure of the public servant’s name may be unreasonable.

I have determined that the documents that fall within the scope of paragraphs (d) and (e) of your request are conditionally exempt under subsection 47F(1) of the FOI Act as they contain information that is “personal information” as defined in subsection 4(1) of the FOI Act and for which disclosure of that personal information would be “unreasonable” under subsection 47F(1) of the FOI Act.

The “personal information” contained in the documents includes names, residential addresses, telephone numbers, email addresses, qualifications, employment history, and personal qualities and attributes in relation to the selection process conducted by the Court. Disclosure of such information would have a detrimental effect on individuals’ privacy. The suitability comments contained in some of the documents include both positive and negative remarks. It is possible that such remarks may cause damage to the person/s relationships within the Court.

In addition to the information about candidates, the documents also include the names, work email addresses and direct telephone numbers of public servants. Publication of the names and titles of public servants is one thing, but revealing telephone numbers that give direct access to them is another.⁹ Those direct contact numbers are, generally, not well-known nor available from publicly accessible sources. Disclosure would provide an avenue to express displeasure with those individuals, and a means to pursue matters through them when there is no need for those individuals to be contacted.

This information is clearly “*personal information*” that would be “*unreasonable*” to disclose under subsection 47F(1) of the FOI Act. Not only is the disclosure unreasonable, but it would also render the Court in breach of its requirement to protect the personal privacy of the individuals concerned. The information contained within the documents is personal and specific to the individuals. I conclude that much of this information makes them easily identifiable.¹⁰

Consultation pursuant to section 27A of the FOI Act was carried out and the objections to the information being disclosed included:

- disclosure would prejudice each individual’s right to privacy,
- disclosure may link the individuals to the allegations set out in the media articles,
- disclosure may have a detrimental effect on professional relationships both within the Court and the broader legal profession,
- disclosure could damage future employment prospects and reputations,
- disclosure would adversely affect the mental health of the individuals concerned, causing stress and anxiety,
- the information contains comments on interview performance and identifying information such as employment history and qualifications, which is highly personal,
- the detailed information provided creates an unreasonable amount of risk that the person concerned may be subject to impersonation or identity theft,
- the personal information was provided during a selection process with an expectation that such information would remain confidential. Disclosure of that information would be a breach of trust by the Court, and reduce the willingness of those affected (and others) to provide personal information to the Court in the future, and
- the information is such that the Australian community would reasonably regard it as sensitive personal information in which there is no legitimate public interest.

For these reasons, I consider that disclosure of the personal information in the documents falling within the scope of paragraphs (d) and (e) of your request would constitute an “*unreasonable disclosure of personal information*”. Accordingly, the documents you have requested are conditionally exempt under subsection 47F(1) of the FOI Act.

⁹ See *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 (9 November 2020) at [128], per (Deputy President S A Forgie).

¹⁰ FOI Guidelines, paragraph 6.131.

Public interest test

In finding that the documents falling within paragraphs (d) and (e) of your FOI request are conditionally exempt pursuant to sections 47C, 47E(c), 47E(d) and 47F of the FOI Act, I am required to consider under subsection 11A(5) of the FOI Act whether it would be contrary to the public interest to give you access at this time. This test is applied in addition to any public interest considerations already discussed above, and may result in the need to consider one or more factors twice.¹¹

Subsection 11A(5) of the FOI Act provides:

The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

There are a number of factors that must be taken into account in considering the public interest test, which are set out in subsection 11B(3) of the FOI Act. There are also certain factors which must not be taken into account (see subsection 11B(4) of the FOI Act). The FOI Guidelines provide non-exhaustive lists of other factors favouring disclosure (see paragraph 6.19), and factors against disclosure (see paragraph 6.22), that may be relevant in certain circumstances.

The public interest test in relation to the conditional exemption of deliberative process was discussed in *Wood; Secretary, Department of Prime Minister and Cabinet* [2015] AATA 945 where Deputy President Forgie at [69] stated:

*Section 11B(2) specifically states that s 11B does not limit s 11A(5) when it provides that the agency or Minister must give the person access to the document if, at the time, access to it would, on balance, be contrary to the public interest. By specifying in s 11B(4) five factors that are always irrelevant in deciding whether access would be contrary to the public interest and, in s 11B(3), four factors that favour access but specifying none that may not favour access, Parliament has implicitly recognised that the factors falling in that last category cannot be captured in that way. **Those factors are very dependent on the particular circumstances attending the way in which a document came into being and attending it subsequently** [emphasis added].*

Paragraph 6.5 of the FOI Guidelines provide the following elaboration on the ‘public interest test’:

The public interest test is considered to be:

- *something that is of serious concern or benefit to the public, not merely of individual interest*
- *not something of interest to the public, but in the interest of the public*
- *not a static concept, where it lies in a particular matter will often depend on a balancing of interests*
- *necessarily broad and non-specific, and*
- *related to matters of common concern or relevance to all members of the public, or a substantial section of the public [footnotes omitted].*

¹¹ FOI Guidelines, paragraph 6.138.

Importantly, and as provided in paragraph 6.5 of the FOI Guidelines, the test requires more than something merely being *of interest* to the public. Rather, the question is whether disclosure of the document/s is *in the interest* of the public.

I accept that there is a public interest in the integrity of public sector recruitment processes and that disclosure of the selection reports and other recruitment related documents would go some way to promoting the objects of the FOI Act. Specifically, certain recruitment documents could be considered to promote “*better-informed decision-making*” by the public sector¹² and to enhance “*scrutiny, discussion, comment and review*” of public sector activities.¹³

Whilst disclosure of certain recruitment documents might be considered to promote the objects of the FOI Act, there are several factors that weigh against a finding that it would be in the public interest to disclose the specific documents requested. In considering the public interest test, I have taken many factors into account. They can be summarised as follows:

- disclosure could be reasonably expected to prejudice the protection of an individual’s right to privacy,
- disclosure may expose the concerned individuals to the risk of inappropriate and unsolicited approaches,
- release of the documents would increase the risk of harm to a person’s current and future employment opportunities,
- release of the documents would increase the risk to the individual’s mental health in terms of the stress and anxiety caused by the information being made publically available,
- disclosure of the information would destroy trust in the confidentiality of the Court’s recruitment processes. This in turn, may discourage prospective candidates from applying for positions, and make it more difficult for the Court to attract candidates in the future,
- in relation to those documents that contain deliberative matter, disclosure may inhibit future deliberations, including deliberative discussions and the exchange of opinions, engaged in between colleagues prior to formal recruitment decisions being made,
- the release of the information could reasonably be expected to create tension amongst employees of the Court by permitting comparisons between individuals,
- disclosure of the information, in particular the information that assesses the weaknesses of candidates, may undermine working relationships within the Court,
- the release of the documents could damage the trust and morale of employees of the Court because those employees who apply for promotions would expect that details of the recruitment process would remain confidential. This may result in a decrease in the productivity of employees,
- the documents contain sensitive information about candidates that is private to each individual. The information does not necessarily concern the person’s usual duties/responsibilities and is not well-known or available from publicly accessible sources,
- almost all individuals who were consulted objected to the disclosure of their personal information for the reason that it would cause harm if it were to be released, and
- because the FOI Act does not restrict any subsequent dissemination of information disclosed, the release of the documents into the public domain has the potential to result in misuse and to cause harm and anxiety for the persons concerned.

¹² Subsection 3(2)(a) of the FOI Act.

¹³ Subsection 3(2)(b) of the FOI Act.

I give significant weight to each of the above factors and, after careful consideration, I have concluded that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. On balance, it appears that the matter is not necessarily “*of common concern or relevance to all members of the public, or a substantial section of the public.*”¹⁴

In the decision of ‘BA’ and Merit Protection Commissioner [2014] AICmr 9 (30 January 2014), the Australian Information Commissioner came to the following conclusion at paragraph 106 in consideration of a similar set of facts concerning recruitment-related documents:

... I have decided that it runs counter to the development of privacy law and practice in Australia to continue to release under the FOI Act the vocational assessment information of a successful candidate, where the candidate objects and the principal public interest reason for release is that the person was the successful candidate.

Therefore, I have decided that the disclosure of the documents subject to the conditional exemptions would be contrary to the public interest and, on that basis, access to the documents should be refused.

Redaction not appropriate under section 22 of the FOI Act

Section 22 of the FOI Act requires me to consider whether access may be granted to edited copies of the documents, with exempt or irrelevant matter deleted. Notwithstanding my findings, detailed above, to refuse access to the documents in paragraphs (d) and (e) of your request, on the basis that they are exempt under the FOI Act, section 22 requires me to consider whether access may be granted to the documents following the redaction of exempt information.

In relation to section 22 of the FOI Act, the FOI Guidelines explain, at paragraph 3.98:

Applying those considerations, an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.

I consider that, under section 22, upon redacting the exempt information due to the conditional exemptions of deliberative processes, operations of an agency and personal privacy, the relevant documents pertaining to paragraphs (d) and (e) retain no value or meaning. It would therefore be futile to grant you access to a redacted copy of the documents as they would convey very “*little of its content or substance.*”

Access Format

In your FOI request, you request that the email address foi+request-8503-aa8c1014@righttoknow.org.au be used for all replies to the request. On this basis, I have decided to grant you access to the relevant documents in PDF format and release the documents to you by email. The document, namely the gazette notice, which you have been granted access to in full, accompanies this letter.

¹⁴ FOI Guidelines, paragraph 6.5.

Charges

You have not been charged for the processing of your request.

Your Review Rights

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

Under section 54 of the FOI Act, you may apply in writing to the Federal Court for an internal review of my decision. The internal review application must be made within thirty (30) days of the date of this letter.

Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within thirty (30) days.

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australia Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within sixty (60) days of the date of this letter and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review-/>
email: enquiries@oaic.gov.au
post: GPO Box 2999, Canberra ACT 2601
in person: Level 3, 175 Pitt Street, Sydney NSW

More information about the Information Commissioner review is available on the Officer of the Australian Information Commissioner website. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

Complaints

If you are dissatisfied with the way the Court has handled your FOI request, you may complain to the Information Commissioner in writing. There is no fee for making a complaint. More information about making a complaint is available on the OAIC website, including a link to the online complaints form which the OAIC recommends using for complaints, at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Yours sincerely,



B Henderson
FOI Officer